Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-745

RAYMOND M. CHENOWETH, dba NELLIS CAB CO.;
SUN CAB INC., dba NELLIS CAB CO.;
PETE ELIADIS, dba LAS VEGAS STAR TAXI, INC.,
dba STAR CAB CO.; PETE BALABAN, dba DESERT CAB CO.
Petitioners,

vs.

(1) STATE OF NEVADA; (2) PUBLIC SERVICE COMMISSION,
STATE OF NEVADA; (3) NOEL CLARK; (4) EVO GRANATA, and
(5) REECE TAYLOR, PUBLIC SERVICE COMMISSIONERS INDIVIDUALLY
AND ACTING IN THEIR OFFICIAL CAPACITIES;
(6) STATE TAXICAB AUTHORITY OF NEVADA,
aka STATE TAXICAB AUTHORITY OF CLARK COUNTY, NEVADA;
(7) MANUEL CORTES, (8) RAY SHEFFERS, (9) PETE
HITCHCOCK, (10) JAMES JONES, (11) B. J. HANDLON,
(12) JOSEPH LA VOIE, (13) WALTER HINSON,
(14) WAYNE MCDORMAN, (15) RUDOLPH COLLETT,
(16) GARY LOGAN, INDIVIDUALLY,
AND AS COMMISSIONERS, ADMINISTRATORS, INVESTIGATORS,
ATTORNEYS, AND EMPLOYEES OF THE STATE TAXICAB AUTHORITY
OF NEVADA; (17) CHECKER CAB CO.; (18) YELLOW CAB CO.;
(19) WHITTLESEA BLUE CAB, INC., dba WHITTLESEA CAB CO.;
(20) ACE CAB CO.; (21) UNION CAB CO.;
(22) VEGAS-WESTERN CAB CO.; (23) GENE MAYDAY;
(24) JAMES BELL; (25) PAT CARVER; (26) CHARLES FRIAS;
(27) DON WALLS; (28) CAB EMPLOYEES, AUTO & WAREHOUSEMEN
LOCAL #881, INTERNATIONAL BROTHERHOOD OF TEAMSTERS;
(29) INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL #631;
(30) INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA; (31) DICK THOMAS;
(32) WILLIAM CARTER; (33) LEO HENDRICKSON;
(34) BOB CHISOLM; AND FICTITIOUS PERSONS DOE 1 THROUGH 100;
AND FICTITIOUS CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS,
BLACK AND WHITE 1 THROUGH 10,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
to the United States District Court for the District of Nevada

JOHN E. THORNE
THORNE, CLOPTON & HERZ
510 North Third Street
San Jose, CA 95112
Telephone: (408) 286-1212
Attorneys for Petitioners

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

	Page
Opinions of court below	2
Jurisdiction statement	2
Questions presented for review	3
Constitutional provisions, statutes, ordinances, and regulations involved	5
Facts supporting issues presented	13
Manner and stage at which Federal questions were raised	22
Argument in favor of issuance of writ	22
Conclusion	33

TABLE OF AUTHORITIES CITED

Cases

	Page
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313	33
Chenoweth, et al. v. Public Service Commission, et al., Case No. A68495, Eighth Judicial District Court of the State of Nevada	17, 18, 20, 21, 29, 30, 32
Eastman v. Yellow Cab Co., 173 F.2d 874	25
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411	31
Ex parte Davis 114 P.2d 186	24
Hughley v. City of Opelika, 251 F. Supp. 566	25
Mirin v. Taxicab Authority of Clark County Nevada, 441 F.2d 1123	17, 18, 20, 21, 29, 30, 32
Mirin, et al., v. The State of Nevada, et al., 547 F.2d 91	17, 18, 20, 21, 29, 30, 31, 32
Montana v. United States, No. 77-1134, 47 L.W. 4190 (February 22, 1979)	21
People v. Sturgeon, 262 N.W. 58	24
SCA Services, Inc. v. Morgan, 557 F.2d 110	27, 28
United States v. Throckmorton, 98 U.S. 61	29, 30
United States v. Wolfson, 558 F.2d 59	27

Constitutions

United States Constitution:	
Fifth Amendment	5, 24
Fourteenth Amendment	6, 24, 25

Rules

United States Supreme Court Rules, Rule 19(1)(a)	3

Statutes

	Page
Nevada Revised Statutes:	
Section 706.151	6, 23, 24
Section 706.8824	6, 25
Section 706.8824(2)(6)	25
28 U.S.C.:	
Section 144	10, 27
Section 455	10, 26, 27
Section 1254(1)	3
Section 1343	7
Section 1343(3)	25
42 U.S.C.:	
Section 1983	8, 25
Section 1985	8
Section 1985(3)	25

Texts

Restatement [2nd] of Judgments, Note 3, § 68	32
Wright and Miller, Federal Practice and Procedure:	
Vol. 9, Section 2372	32
Section 3546	27
Section 3550 (Supp.)	27

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to the United States Court of Appeals
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and
to the United States District Court
for the District of Nevada

OPINIONS OF COURT BELOW

Petitioners ask that a Writ of Certiorari issue to review the following decisions of the Federal District Court for the District of Nevada and the Ninth Circuit Court of Appeals:

(a) Order of the District Court dated January 12, 1978, denying Petitioners right to file a Second Amended Complaint and dismissing the entire action, a copy of which is attached hereto and marked Exhibit A.

(b) Order of the District Court dated February 21, 1978, denying disqualification of the judge, a copy of said Order being attached hereto and marked Exhibit B.

(c) The unsigned and undated Order of the Ninth Circuit Court of Appeals filed April 3, 1979, dismissing Petitioner's Appeal, a copy of which is attached hereto and marked Exhibit C.

(d) The unsigned and undated Order of the Ninth Circuit Court of Appeals filed August 13, 1979, denying a Petition for Rehearing, a copy of which is attached hereto and marked Exhibit D.

JURISDICTION STATEMENT

I

The decisions referred to above were issued on the following dates:

(a) The decision of the United States District Court (Exhibit A), January 12, 1978,

(b) The decision of the United States District Court (Exhibit B), February 12, 1979,

(c) The decision of the Ninth Circuit Court of Appeals (Exhibit C), filed April 3, 1979,

(d) The decision of the Ninth Circuit Court of Appeals (Exhibit D), filed August 13, 1979.

II

The statutory provisions believed to confer on this Court jurisdiction to review the judgments referred to are:

(a) 28 U.S.C. 1254(1), and

(b) United States Supreme Court Rule 19(1)(a).

QUESTIONS PRESENTED FOR REVIEW

I

Each of the Petitioners in this case owns a small taxicab company in Las Vegas, Nevada, two with 5 cabs each, one with 7. They are in competition with approximately seven larger companies, the largest two of which have 79 cabs each. *The number of taxicabs each company may operate is established by a "Taxicab Authority" created by the State of Nevada.* From this set of facts arises a quite simple constitutional question:

> May government, through the right of police power for public protection, license a number of competitive taxicab companies, and then *unequally* distribute among the companies the number of cabs each may operate?

II

Petitioner Chenoweth had been a party in a number of lawsuits involving his taxicab business and the State of Nevada. He had the same attorney in all of the prior liti-

gation, and won every single case (approximately 14 or 15). Then the attorney lost two cases, neither of which went to trial, because the attorney had been paid by Chenoweth's competitors to "drag his feet" in Chenoweth's cases. Those two lost cases have been used as res judicata against Petitioners ever since that time.

Petitioner Chenoweth filed suit in Federal court against the attorney. Additionally, Petitioners had filed an anti-trust complaint in the same Federal court. Thus the suit against the attorney, the anti-trust case, and the instant action, were filed in the same Federal District Court at the same time.

During the pre-trial activities in the three actions (all involving the taxicab problems) Judge Bruce Thompson of the Northern Nevada Federal District Court ordered a status conference on all three of the actions at the same time, the first sentence of his Order reading, "The actions entitled above pending in this court involve the same general subject matter."

Judge Thompson dismissed all three actions on the grounds of res judicata. Following that dismissal Petitioners learned that Judge Thompson's son was a lawyer employed by the very law firm representing the attorney sued by Petitioner Chenoweth in one of the three cases! From these facts arise the simple questions:

> Should Judge Thompson have disqualified himself on the grounds of possible prejudice because his son was employed in the law firm of defense counsel? Should he have disqualified himself on his own motion, knowing that his son was employed by a law firm representing one of the defendants?

III

Petitioner, Pete Balaban, d.b.a. Desert Cab Co., has never been involved in any litigation involving his taxicab company. He most assuredly was not a party to any of the cases that have been cited as the res judicata basis for dismissing the instant action. Yet Judge Thompson dismissed the case of Mr. Balaban and refused his request to file a Second Amended Complaint. From these facts comes the following question:

> Was the Court's determination that Petitioner's First Amended Complaint was barred by res judicata and for other reasons, erroneous on at least three separate and independent grounds: (a) res judicata should not operate to prevent one who alleges deprivation of constitutional rights from having a trial on the merits, (b) merger and bar should not deprive Petitioner's of the right to litigate matters which arose recently and which could not have been litigated in previous actions, and/or (c) collateral estoppel cannot bar an action by a plaintiff who was not a party to previous litigation?"

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

(1) The pertinent portion of the United States Constitution, Fifth Amendment, which reads:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

(2) The pertinent portion of the Fourteenth Amendment, United States Constitution, which reads:

"No state shall make or force any law which shall abridge the privilege or immunities of citizens of the United States; nor shall a state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) The pertinent portion of Nevada Revised Statutes (hereinafter NRS), 706.151 which reads:

"1. It is hereby declared to be the purpose and policy of the legislature in enacting this chapter:

(a) ...

(b) ...

(c) To provide for fair and impartial regulation, to promote safe, adequate economical and efficient service and foster sound economic conditions in motor transportation, and to encourage the establishment and maintenance of reasonable charges for such transportation services, *without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.*

2. All of the provisions of this chapter shall be administered and enforced with a view to carrying out the declaration of policy contained in subsection 1." (Emphasis added)

(4) The pertinent portions of NRS 706.8824 which read:

"1. Whenever circumstances require a change in the allocations existing on July 1, 1969, or afterward established, the taxicab authority shall allocate the number of taxicabs among the certificate holders in any county to which NRS 706.881 to 706.885, inclusive, apply.

2. In determining the allocation of taxicabs as set forth in subsection 1, the taxicab authority shall consider:

(a) ...

(b) ...

(c) ...

(d) Any other factors which the administrator considers necessary and proper for determining the allocation."

(5) 28 USC 1343 which reads:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

(6) 42 USC which reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(7) 42 USC 1985 which reads:

"(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property

on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the

recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(8) 28 USC 144 which reads:

"Whenever a party to any proceeding in district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

(9) 28 USC 455 which reads:

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated

in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

FACTS SUPPORTING ISSUES PRESENTED

The first issue asks:

"May government, through the right of police power for public protection, license a number of competitive taxicab companies, and then *unequally* distribute among the companies the number of cabs each may operate?"

The facts supporting the need for this Court's decision on this first issue are as follows:

Petitioner Chenoweth initiated the action in this case by the filing of his in propria persona Complaint. Thereafter the undersigned was retained as counsel, and with permission of the Court filed a First Amended Complaint, that Complaint now being dismissed by the Court at the same time the Court denied permission to file a Second Amended Complaint. The Second Amended Complaint added as plaintiffs two former defendants in the First Amended Complaint (Petitioners herein Eliadis and Balaban), those defendants being the owners of two other small cab companies who also operated in designated areas of Clark County.

In 1962, Petitioner Chenoweth obtained the necessary business licenses to operate an unlimited number of cabs in Clark County, Nevada and North Las Vegas, Nevada. In the latter part of 1962, the Nevada Public Service Commission (hereinafter PSC) adopted rules and regulations concerning the operation of taxicab businesses, and the Nevada legislature thereafter amended the law so as to require

every taxicab operator to obtain a Certificate of Public Convenience and Necessity in order to operate. Petitioner Chenoweth's right to do business in Clark County was terminated by the refusal of the County to issue a new license on the grounds that Petitioner did not have the necessary Certificate from the PSC. Chenoweth's City license in North Las Vegas was still in existence, and thus he continued to operate in that City. In 1964 he received his first Certificate from the PSC, this Certificate giving him the right to operate an unlimited number of cabs in North Las Vegas, Nevada, only. Thereafter, Chenoweth obtained a second Certificate from the PSC which, even though there was no statute or regulation permitting such limitation, limited Chenoweth to one cab in Clark County.

Following this the Respondent Teamster's Union and various Respondent cab companies entered into an agreement that called for a limitation of only 200 cabs to operate in Clark County. In 1936 the Clark County Board of Commissioners allocated cabs to the eight companies then licensed in the business as follows:

Checker	58
Yellow	58
Whittlesea Blue	43
Ace	23
Union	15
Nellis	1
Star	1
Strip	1
Total	200

After continued difficulty in the industry, both from a labor standpoint as well as from a legislative standpoint concerning the action of the County Board of Commissioners

and the State agencies, the State PSC issued an order adjusting the allocation of cabs in Clark County as follows:

Checker	60
Yellow	60
Whittlesea Blue	50
Ace	20
Union	15
Star	3
Nellis	1
Strip	1
Total	210

In 1967 the PSC held a general session and considered the application of Petitioner Chenoweth for an enlarged service area for his taxicab business. The PSC then issued Chenoweth a new Certificate of Public Convenience and Necessity which, 1) granted him the enlarged service area, 2) cancelled his two previous Certificates, and 3) made the new Certificate effective in December of 1967. Under the terms of this new Certificate *there was no limitation as to the number of cabs Chenoweth could operate.*

Further legal battles (brought by various cab companies) occurred in the taxicab industry, these challenging the right of the PSC to allocate cabs, and challenging the Petitioner Chenoweth's right to operate the number of cabs he then had on the streets, approximately 60. During this chaotic period, the Nevada Legislature established the State Taxicab Authority (hereafter "TA"), limiting its jurisdiction to counties having a population of 200,000 or more. This effectively meant the Taxicab Authority had jurisdiction only in Clark County, for that was and is the only county meeting the minimum population requirement.

Through all of this legal battling Petitioner Chenoweth was first permitted to operate an unlimited number of cabs,

was thereafter restricted to one, was increased to eleven, was then entitled to an unlimited number of cabs (during which time he increased to approximately sixty), was reduced to one, increased to two, and by mid-April of 1977, was limited to five cabs.

By its order of September 1974, the following companies were in existence with the required Certificates of Public Convenience and Necessity, and had the following taxicab allocations and service areas in square miles:

Company	Taxicab Allocation	Service Area in Square Miles
Yellow	79	229 sq. mi.
Checker	79	209 " "
Whittlesea Blue	67	2,585 " "
Ace	32	240 " "
Union	22	169 " "
Western	9	338 " "
Star (Petitioner Eliadis)	7	2,585 " "
Henderson	6	224 " "
Desert (Petitioner Balaban)	5	82 " "
Vegas-Western	5	2,585 " "
Nellis (Petitioner Chenoweth)	5	2,585 " "

The service areas assigned to Petitioners encompass all of the area allocated to any of the other companies. It is interesting to note that Petitioners Chenoweth and Eliadis have 2,585 square miles to service with five and seven taxicabs each, while the two companies with the largest allocations (Yellow and Checker—79 each) have only 229 and 209 square miles!

Based upon the above facts, Petitioners seek a hearing before this Court to determine the constitutionality of the unequal distribution of taxicabs to the certificated companies, claiming a violation of their constitutional rights to due process and equal protection of the laws.

II

The second issue asks:

> "Should Judge Thompson have disqualified himself on the grounds of possible prejudice because his son was employed in the law firm of one of defense counsel? Should he have disqualified himself on his own motion, knowing that his son was employed by a law firm representing one of the defendants?"

The facts supporting the need for this Court's decision on this second issue are as follows:

During all of the aforementioned facts regarding the first issue concerning disputes over Petitioner Chenoweth's right to operate cabs in Clark County, he was represented by a Nevada attorney (Hilbrecht) who won every case (some 14 or 15) until *Mirin v. Taxicab Authority of Clark County Nevada,* 441 F.2d 1123, (hereinafter *"Mirin I"*), and a State case, *Chenoweth, et al. v. Public Service Commission, et al.,* Case No. A68495, Eighth Judicial District Court of the State of Nevada (hereinafter *"State Mirin"*). Both of these he lost, one by failing to file an appeal in time, and the Federal case by failing to state a claim upon which relief could be granted. *"State Mirin"* and *"Mirin I"* were used for the res judicata dismissal of *Mirin, et al, v. The State of Nevada, et al.,* 547 F.2d 91 (hereafter *"Mirin II"*).

Subsequent to the first two decisions, and while *Mirin II* was on appeal to the Ninth Circuit, Petitioner Chenoweth learned from an official of a competing taxicab company that his prior attorney had been retained at $1,000 a month by his competitors under an agreement that the attorney was to "drag his feet" on the Chenoweth cases. It was

subsequent to accepting the monthly retainer, that the attorney lost the *State Mirin* and *Mirin I* on technicalities. An Affidavit establishing these facts, signed by the official of the competing company, is in evidence and undisputed, and even though that fact was presented to the Ninth Circuit (in order to argue that cases lost by the illegal activity of one's attorney should not be res judicata in subsequent litigation), the Ninth Circuit used those two deliberately lost cases as res judicata to uphold dismissal in *Mirin II!* This Supreme Court then denied a Petition for Certiorari. (See Petiton for Certorari, United States Supreme Court, No. 76-1516.)

Based upon the facts surrounding the prior attorney's actions, Petitioner Chenoweth filed suit in Federal District Court, Northern District of Nevada, against the attorney. Additionally, through other counsel, Petitioner Chenoweth and Petitioners Eliadis and Balaban had filed an anti-trust action against Respondents. Thus, at one time there was an anti-trust action in the pleading stage before the District Court involved, a suit against the attorney, and the instant action. The cases were so closely involved with the same facts and so intertwined that Petitioners moved the District Court to consolidate all three. The District Court, with a variety of motions pending in the various cases, called a status conference in all three actions by issuing one order applicable to all three, the first sentence of that order reading, "The actions entitled above pending in this Court involve the same general subject matter." The Court denied the motion to consolidate the three actions, and following the status conference amended complaints were prepared in all three cases, those amended complaints being identical

in their language. Motions were made to permit the filing of these amended complaints, those motions being denied, and all three cases were dismissed on the grounds of res judicata.

Additionally, Mr. Kermitt Waters, an attorney for Petitioners in the anti-trust action which was dismissed along with the instant case, had been ordered by Judge Thompson in a prior criminal case not to appear in Judge Thompson's court again. In his Order Denying Disqualification in the instant case, Judge Thompson denies it was an "Order", but he does say, "The undersigned in exasperation indicated that he did not want to see Kermitt Waters in his court any more." (See Appendix Exhibit B)

Following the Court's dismissal, Petitioners learned the Judge's son was an attorney employed in the office representing attorney Hilbrecht, a defendant in one of these three dismissed cases. Petitioners immediately filed an affidavit establishing the basis for the prejudice and their motion with the District Court, asking the Judge to disqualify himself and set aside his prior orders of dismissal, that motion also being denied by the Judge. (See Appendix, Exhibit B.) The Ninth Circuit, by upholding the District Judge's dismissal of the instant action, upheld the District Court's denial of disqualification.

Petitioners suggest that a judge whose son is an attorney in the law office representing the Defendant in one of three cases which are so closely related the Court describes them as involving "the same general subject matter", should disqualify himself on his own motion if he knew that fact to exist, and we suggest he surely must have known since his

son's law firm is in Reno, Nevada, where the Court has its office. If we assume the Judge did not know his son was employed in the law office representing one of the Defendants, most assuredly the Judge should disqualify himself after counsel has pointed out this set of facts.

III

The third issue asks:

> "Was the Court's determination that Petitioner's First Amended Complaint was barred by res judicata and for other reasons, erroneous on at least three separate and independent grounds: (a) res judicata should not operate to prevent one who alleges deprivation of constitutional rights from having a trial on the merits, (b) merger and bar should not deprive Petitioners of the right to litigate matters which arose recently and which could not have been litigated in previous actions, and/or (c) collateral estoppel cannot bar an action by a plaintiff who was not a party to previous litigation?"

The facts supporting the need for this Court's decision on this third issue are as follows:

In dismissing this action, the District Court Judge ruled that this case

> "involves substantially the same parties and the same subject matter as the earlier actions. . . . Plaintiffs and their associates are precluded by all prior rulings from relitigating issues respecting the allocation of taxicab medallions in Clark County, Nevada."

The decisions the Court based its res judicata ruling on were *"Mirin I"*, *"State Mirin"*, and *"Mirin II"*. Just as in the case at hand, none of these three cases ever went to trial and was decided on the merits. the first two being the cases

Chenoweth's prior attorney deliberately lost, and *"Mirin II"* being dismissed on res judicata based on *"Mirin I"* and *"State Mirin"*. It should also be noted at this point that Petitioner Balaban was not a party to any of the prior litigation involving the taxicab industry, and most assuredly was not a party to any cases cited by the District Court as the basis for his res judicata dismissal of the action at hand.

It should be noted that none of these cases used as res judicata to dismiss the instant case raised the constitutional claim of denial of due process and equal protection by virtue of the unequal distribution of cabs.

The Ninth Circuit Court of Appeals upheld the District Court's dismissal of the instant case on res judicata grounds, citing only one case, *Montana v. United States*, No. 77-1134, 47 L.W. 4190 (February 22, 1979). (See Exhibit D of Appendix.)

Petitioners suggest that res judicata, 1) should not operate to prevent one who alleges deprivation of constitutional rights from having a trial on the merits, 2) merger and bar should not deprive one of the right to litigate matters which arose recently and which could not have been litigated in previous actions, and 3) collateral estoppel cannot bar an action by one who was not a party to the previous litigation.

We also note at this point that in the dismissed Complaint, Petitioners claimed all of the Respondents conspired to deprive Petitioners of their constitutional rights and their civil rights, thus bringing about the unequal distribution of taxicabs and causing Petitioners financial damage.

MANNER AND STAGE AT WHICH FEDERAL QUESTIONS WERE RAISED

All of the constitutional and federal questions presented were raised in the Complaint dismissed by the District Court, and in the Second Amended Complaint the District Court would not allow to be filed.

The question of the Judge's disqualification by virtue of his son being employed in the office representing one of the Defendants in the companion case, was raised immediately upon counsel's learning that the Judge's son was so employed, i.e., shortly after the Judge issued his Order dismissing all three cases mentioned above.

ARGUMENT IN FAVOR OF ISSUANCE OF WRIT

ISSUE No. 1:

> May government, through the right of police power for public protection, license a number of competitive taxicab companies, and then *unequally* distribute among the companies the number of cabs each may operate?

This issue has never been answered by this Supreme Court, by any Circuit Court of Appeals, or by any reported decision from any court anywhere that Petitioners can find.

This question goes to the heart of our existence as a free enterprise nation. If we are in fact a nation believing in free enterprise, we respectfully suggest this Court should accept the Petition, decide the case, and hold that it is unconstitutional for government at any level to adopt rules and regulations, the sole affect of which is to give one

business competitor an enormous economic advantage over other business competitors.

If we do not believe in the free enterprise system—and the system of competition—then let us say so by denying this Petition, thus allowing Nevada to continue in what we suggest is an unconstitutional interference with the civil rights of Petitioners' small cab companies who are denied the right to compete equally with other licensed companies. By limiting two of the Petitioners to only five cabs each and one Petitioner to seven, while allowing competitors to have 79 cabs each, is certainly a denial to compete equally in the economic market.

We do not argue that as citizens we have the right to police various businesses so as to protect ourselves. Thus, in the taxicab business, we most assuredly have a right to license operators to assure the public of clean, properly insured, and safe taxicabs with qualified drivers. Additionally, we can regulate the rates charged, but even as we could not say to one taxicab company, "You are allowed to charge fifty cents a mile", but to another, "You are allowed to charge only twenty-five cents a mile", we should not be allowed to tell one company, "You may have 79 cabs", while the competitor is told, "You may have only five". This unequal allocation of medallions (each medallion carrying the right to operate one cab) is in violation of Nevada's own legislative policy governing motor vehicle carriers as set forth in NRS § 706.151 which prohibits unjust discrimination and unfair competitive practice. Allowing two companies to operate 79 cabs, and limiting others to only five is, we suggest, "unjust discrimination, undue preference or advantage", constituting "destructive com-

petitive practices", all of which are prohibited by NRS § 706.151.

Our own United States Constitution makes it quite clear that government is to keep hands off the competitive side of business even though government has regulatory power to protect the public. (Fifth and Fourteenth Amendments). Government must not be allowed to say to one business competitor, "You will be allowed to do $5 million worth of business", and to another, "You will be allowed to do only $100,000 worth of business". If the power to tax is the power to destroy—the power to control the amount of business one competitor may do as opposed to another, is blatant and uncontrolled dictatorial power. If our Constitution permits such unequal distribution of the right to compete in the taxicab industry, we may well find the government agencies who license restaurants giving one competitor ten such restaurants each seating 100 customers, while another receives only one restaurant seating 50 customers. And, yes, government may be telling some lawyers they may have 50 clients at any one time, while telling others they may have only 10.

The exercise of police power by a state is valid only when based on public need, health, safety, and convenience, and is not arbitrary or capricious. A statute or ordinance is unconstitutional when it authorizes administrative officers or boards to arbitrarily grant or refuse licenses and does not prescribe a uniform action, or where the statute or ordinance, although valid on its face, is enforced so as to discriminate against certain persons, occupations, or privileges, of the same class. (Ex parte *Davis* 114 P.2d 186; *People v. Sturgeon,* 262 N.W. 58).

The unequal allocation of cabs among companies constitutes an act of "classification" by the State. Equal protection as guaranteed by the Fourteenth Amendment, permits such classification only so long as it is founded on a reasonable basis. Classifications which are "clearly arbitrary and unreasonable constitute discriminatory class legislation invalid under the Fourteenth Amendment of the U. S. Constitution" as enforced by 28 U.S.C. § 1343(3), 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). Licensing laws authorizing the granting or denial of permits so as to favor one group over another violate the equal protection clause of the Fourteenth Amendment (*Hughly v. City of Opelika,* 251 F. Supp., 566). The right of small cab companies to contest unequal state enforcement of taxicab regulations in Federal court has been upheld (*Eastman v. Yellow Cab Co.,* 173 F.2d 874). In the *Eastman* case, the Court said:

> "While the federal government does not have the right to regulate certain matters exclusively within the control of the State, *it does have the right, by virtue of the XIV Amendment, to prevent any such regulation from being arbitrary and discriminatory.* (Citing cases). (Emphasis added).

Finally, the State law authorizing allocation of taxicabs in Nevada (NRS § 706.8824) is vague on its face, particularly § 2(d) thereof, which states the Taxicab Authority should consider "any other factors which the Administrator considers necessary and proper for determining the allocation." We suggest the statute itself is arbitrary and capricious, and therefore an unconstitutional delegation of legislative power under the foregoing cases.

Petitioners suggest this is a free enterprise country—and that government should not regulate competition under the police power!

ISSUE No. 2:

> Should Judge Thompson have disqualified himself on the grounds of possible prejudice because his son was employed in the law firm of one of defense counsel? Should he have disqualified himself on his own motion, knowing that his son was employed by a law firm representing one of the defendants?

As we have seen, the Judge's son was an attorney in an office representing the defendant in one of three actions which the Judge said, in ordering all three cases before him by a single order for a status conference, "The actions entitled above pending in this Court involve the same general subject matter." The case at hand was one of those three cases. By the time the Judge ordered dismissal in the three cases, his son had become a partner in the defense firm. In the case in which the defendant attorney was represented by the law firm employing the Judge's son, Petitioner Chenoweth sought damages against the attorney for deliberately losing two of Petitioner's cases, the two lost cases being the res judicata basis for dismissing the instant action.

Petitioners had made a Motion to Consolidate these three cases long before knowing of Judge Thompson's son's connections with the law firm representing one of the defendants. Judge Thompson denied that Motion to Consolidate without explanation. We suggest Judge Thompson should have disqualified himself under 28 USC § 455. The statute

is directed to the Judge, hence is self-enforcing, and need not even be raised by motion or affidavit. (*United States v. Wolfson*, 558 F.2d 59). Furthermore, the language "Any justice . . . shall" means that 28 USC § 455 sets forth "mandatory" or "per se" requirements. (*SCA Services, Inc. v. Morgan*, 557 F.2d 110; Wright and Miller, Federal Practice and Procedure, § 3546, page 364, § 3550, Supp. p. 197, n. 3).

In his Order Denying Disqualification, Judge Thompson says his son did not become a member of the law firm " . . . until January 1, 1978"; as an employee his son had no financial interest in the firm's cases; and further his son had not appeared before him in this or any other case. Based on these statements, the Judge held himself qualified. (See Exhibit "B", Appendix.)

Further, one of the attorneys representing Petitioners in the anti-trust case involved here, Mr. Kermitt Waters, had been ordered by the Court to stay out of his court room in the future, this occurring in a prior criminal case in which Mr. Waters appeared. In his Order Denying Disqualification, Judge Thompson claims this was not an "Order", but he admits he had said ". . . he did not want to see Kermitt Waters in his court any more." We suggest Judge Thompson should have disqualified himself on the ground of bias and prejudice against Petitioners' attorney under 28 U.S.C. § 144.

These issues are similar to those decided by the Seventh Circuit in *SCA Services, Inc. v. Morgan*, 557 F.2d, 110. There the judge's brother was a partner in a law firm that entered a general appearance on behalf of one of the

parties. The brother did not appear in the case. The Court of Appeal in *SCA Services, Inc.*, said:

> "When one brother is a lawyer in the firm representing a party before his brother who is a judge in the case, the belief may arise in the public's mind that the brother's firm and its clients will receive favored treatment, *even if the brother does not personally appear in the case.*" (Emphasis added)

When three cases involve "the same general subject matter" (in this case the taxicab business and its problems in Clark County, Nevada), have some common parties in all three cases, and the Judge's son is employed by a firm representing one of the Defendants (and is a partner at the time of the dismissal of all three cases), and when that Defendant is an attorney who deliberately lost the two cases which form the res judicata basis for dismissing the three cases, we suggest that Judge should be disqualified. It is difficult enough for the public to understand the complexities of the law which supposedly protects them. We need not add "an appearance of partiality" as the Court said in *SCA Services, Inc.*

ISSUE No. 3.

> Was the Court's determination that Petitioner's First Amended Complaint was barred by res judicata and for other reasons, erroneous on at least three separate and independent grounds: (a) res judicata should not operate to prevent one who alleges depravation of constitutional rights from having a trial on the merits, (b) merger and bar should not deprive Petitioner's of the right to litigate matters which arose recently and which could not have been litigated in previous actions, and/or (c) collateral estoppel cannot bar an action by a Plaintiff who was not a party to previous litigation?

In the case at hand, the Court cited three cases as the basis for dismissing on the grounds of res judicata, *"Mirin I"*, *"State Mirin"*, and *"Mirin II"*. Mirin II was also dismissed on res judicata grounds, using *Mirin I* and *State Mirin* as the basis. None of those cases raised the issues presented in the instant action. More importantly, *Mirin I* and *State Mirin* were cases deliberately lost by Petitioner Chenoweth's then attorney, and neither those two cases nor *Mirin II* ever went to trial and had a decision on the merits.

The concept of due process embodied in the Fifth Amendment has traditionally been equated by this Court and all other courts with a notion of fundamental fairness. This Court has long recognized that where extrinsic fraud has been practiced in a judicial proceeding, there has never been a real adversary hearing. (*United States v. Throckmorton*, 98 U.S. 61). In *Throckmorton*, this Court recognized a limited class of exceptions to the general rule of res judicata, saying:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant had no knowledge of the suit, being kept in ignorance by acts of the plaintiff, *or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed cor-*

> *ruptly sells out his client's interest to the other side*— these, and similar cases would show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

The rule of law to be gleaned from this Court's decision in *Throckmorton* is that the public policy demand for an end to litigation, yields to the interest of justice where extrinsic fraud has been practiced upon a party, because the natural and inevitable effect of such fraud is to deprive that party of the opportunity of fully presenting his case and renders the result as to him no real trial at all.

Mirin I did not raise the constitutional and civil rights issues presented in the instant case. The Ninth Circuit, in *Mirin I,* upheld dismissal because the Petition "failed to state a claim upon which relief could be granted", and because the appeal had "become moot" on account of new public hearings of the Taxicab Authority. *State Mirin* did not raise these constitutional and civil rights issues, and likewise did not go to trial on the merits. *Mirin II* was an attempt by Petitioner Chenoweth to recover the value of some 60 taxicabs and the right to operate those cabs, all of which had been taken away by the State of Nevada. It did not go to trial on the merits, rather being dismissed by the District Court on the grounds of res judicata, citing *Mirin I.*

This Court's determination in *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, parallels some of the issues in this case. In *England,* petitioners brought an action in Federal court challenging state medical licensing statutes on constitutional grounds. The Federal District Court remitted plaintiff's case to the State court where plaintiffs argued and lost. The petitioners then returned to the Federal court which dismissed on the grounds of res judicata, but this Supreme Court reversed, saying:

> "There are fundamental objections to any conclusion that a litigant who has properly evoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a State court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction on the Federal courts, and with the principle that 'when a Federal court is properly appealed to in a case which it has by law jurisdiction, it is its duty to take such jurisdiction'."

Mirin II was filed on December 10, 1971, and is the most recent of the three cases relied upon for the res judicata determination dismissing the instant action. Petitioner's First Amended Complaint, which has been dismissed in the instant action, was filed January 21, 1976, and it alleges a number of factual developments which happened long after December 10, 1971. Thus three cases which precede the instant action by at least four years are used as res

judicata to deny a trial on the merits of these new facts occurring long after December 10, 1971. When it applies, the merger and bar doctrine precludes only litigation of any issue that was litigated or might have been presented in the prior action. (Restatement [2nd] of Judgments, Note 3, § 68) As none of the new facts which form the basis for the constitutional and civil rights challenge in the instant action had occurred at the time of *Mirin I, State Mirin,* and *Mirin II,* we suggest those cases cannot be res judicata as to those new facts.

Finally, Petitioner Balaban in the instant case, was not a party in any of the three cases used as the res judicata basis for dismissing the instant action. Merger and bar does not operate with respect to persons who were not parties to the previous litigation.

In addition, because the prior cases were dismissed on procedural grounds and not actually litigated, Petitioner Balaban should not be barred by collateral estoppel from presenting issues at this time. As a general rule, even outside of the civil rights context,

> "Though the dismissal is with prejudice, if no facts have been adjudicated, as when the dismissal is for want of prosecution, the judgment, though a bar to a second suit on the same claim, did not establish any facts to which the doctrine of collateral estoppel can be applied in later litigation on a different claim". (Wright & Miller, Federal Practice and Procedure, Vol. 9, § 2372, page 231).

This Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, stated the rule as follows:

> "Some litigants—those who have never appeared in the prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits stopping them despite one or more existing adjudications of the identical issue which stands squarely with their position." (*Blonder-Tongue Laboratories, Inc., Supra,* at page 329.)

The issues presented in the instant case have never been litigated at all, much less resolved by a former adjudication "which stands squarely" against Petitioner Balaban's position.

For the foregoing reasons, we suggest res judicata is not a proper ground for dismissing the instant case.

CONCLUSION

We have seen that three cases which never went to trial and which failed to raise the constitutional and civil rights issues presented in the instant case, have been used as the res judicata basis for dismissing the case at hand. Additionally, two of those three cases were deliberately and fraudulently lost by one of Petitioners' attorneys, and those two cases formed the res judicata basis for dismissing the third case.

But most importantly, the basic issue presented herein has not been decided by this or any other Court. That issue

asks whether or not government may, under the police power for the protection of the citizens, license competing businesses and then unequally divide the right to do business among those competitiors? We respectfully suggest this Court should grant the Petition for Certiorari so as to answer this fundamental question.

Dated the 6th day of November, 1979.

Respectfully submitted,
THORNE, CLOPTON & HERZ

By JOHN E. THORNE
Attorneys for Petitioners

(Exhibits Follow)

EXHIBITS

EXHIBIT A

In the United States District Court
for the District of Nevada

[Filed January 12, 1978]

Raymond M. Chenoweth, et al., Plaintiffs, vs. (1) State of Nevada, et al., Defendants.	Civil No. R-74-132 BRT

ORDER

Plaintiffs have moved for leave to file a Second Amended Complaint. Count I alleges a common law conspiracy; Count II alleges unlawful monopolization and restraint of trade under state law and also under federal law (the latter claim being a direct affront to the earlier order of this Court dismissing all federal anti-trust claims for relief); Count III seeks injunctive relief against the State Taxicab Authority relative to the distribution among competing companies of taxicab medallions; Count IV alleges that the Taxicab Authority Act violates the Nevada Constitution; Count V is a prayer for punitive damages; Count VI is a prayer for attorney fees.

None of the alleged claims for relief in the tendered Second Amended Complaint states a claim within the jurisdiction of this Court.

All the claims for relief in the First Amended Complaint and in the tendered Second Amended Complaint are barred

by the doctrine of res judicata. The history of the litigation concerning the regulation of taxicabs in Clark County, Nevada is interesting.

On January 30, 1969, plaintiffs Chenoweth and Mirin, along with Fred D. Hasty and Joseph H. Abrahams, instituted suit in this Court against the Public Service Commission of the State of Nevada (hereafter "the Commission") and the members of the Commission in *Mirin, et al. v. Taxi Cab Authority of Clark County, et al.,* LV-1256 (hereafter *"Mirin-I"*). The complaint in *Mirin I* sought to enjoin enforcement of the December 14, 1966 Allocation Order of the Commission, which regulated the number of taxicabs that could be operated in Clark County, Nevada, on the ground that said order violated plaintiffs' constitutional rights to due process and equal protection of law. On June 25, 1969, Judge Foley granted defendants' motion to dismiss the complaint with prejudice and, on April 29, 1971, the Court of Appeals affirmed that dismissal on the ground that the complaint failed to state a claim upon which relief could be granted. *Mirin v. Taxi Cab Authority of Clark County, Nevada,* 441 F.2d 1123 (9th Cir. 1971).

On August 7, 1969, plaintiffs Chenoweth and Mirin filed a suit in State Court against the Commission, this time adding the Clark County Taxicab Authority (hereafter "Taxicab Authority") as a defendant. *Chenoweth, et al. v. Public Service Commission, et al.,* Case No. A 68495, Eighth Judicial District Court of the State of Nevada (hereafter *"State Mirin"*). This new case again alleged that the December 14, 1966 Allocation Order violated plaintiffs' constitutional rights of due process and equal protection.

and that a new Allocation Order passed by the Commission on July 18, 1969, likewise violated plaintiffs' rights. On September 5, 1969, the State Court ruled in favor of defendants on the ground, *inter alia,* that the said Allocation Orders were "not unreasonable, arbitrary or unlawful, and the utilization of such formula did not deny the plaintiffs any legal rights." On September 28, 1970, the Supreme Court of Nevada ordered dismissal of the appeal in *State Mirin.*

On December 10, 1971, plaintiffs Chenoweth and Mirin, this time joined by plaintiff Las Vegas Star, launched a third constitutional attack upon the December 14, 1966 Allocation Order and the July 18, 1969 Allocation Order, by the filing in this Court of *Mirin, et al. v. The State of Nevada, et al.,* Civ. No. LV-1638 (hereafter *"Mirin II"*). Jurisdiction in this action was based, *inter alia,* upon 42 U.S.C. § 1983. On December 27, 1974, Judge Foley entered judgment against plaintiffs Chenoweth and Mirin on grounds of res judicata. On October 22, 1976, the Ninth Circuit Court of Appeals affirmed Judge Foley, ruling that the "valid and final judgment in [*Mirin I*] operates as an absolute bar" to *Mirin II*:

> "It is clear the parties involved in these proceedings and those in *Mirin-I* are identical or their privies. Further, Appellants' attack upon the commission's reinstatement of its allocation order of December 14, 1966 in *Mirin-I* and their attack upon the same order in these proceedings are each based upon the same federal questions and claims which were, or could have been raised in Mirin-I. 547 F.2d 91, 94."

Fred D. Hasty and Joseph Abrahams were the owners of Star Cab Co., a partnership, at the time the complaint in *Mirin I* was filed. The present corporate plaintiff, Las Vegas Star Taxi, Inc., became the successor in interest to the partnership as the result of an agreement among the partners to transfer all the assets and liabilities of the partnership to the corporation.

On January 29, 1973, action No. 2803 was commenced in this Court by Chenoweth, Mirin and Balaban against numerous defendants.

The original complaint, brought by plaintiffs Chenoweth, Mirin, Las Vegas Star Taxi, Inc., and Balaban, sought relief under the federal anti-trust laws (Counts I and II) and the Civil Rights Laws (Counts III, IV and V). On October 29, 1976, this Court dismissed Counts I and II for lack of subject matter jurisdiction. Thus, what remains of the complaint are the civil rights counts, brought on behalf of an alleged class of taxicab operators in Southern Nevada.

The dismissal of Counts I and II was appealed and said appeal was ultimately dismissed for lack of prosecution. Finally, after thorough briefing and argument this Court entered an Order on December 29, 1977, granting summary judgment and dismissing the action with prejudice.

Despite the aforesaid litigation history, plaintiffs commenced the instant action on September 9, 1974. It involves substantially the same parties and the same subject matter as the earlier actions referred to. Plaintiffs and their associates are precluded by all prior rulings from re-

litigating issues respecting the allocation of taxicab medallions in Clark County, Nevada.

Further, the action against the Public Service Commission of Nevada and the Public Service Commissioners Clark, Granata, and Taylor, is time-barred because their involvement in the allocation of taxicab medallions ended more than four years before the commencement of this action, 15 U.S.C. 156, *Int. T. & T. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913 (9th Cir 1975)

In consideration of the premises,

IT HEREBY IS ORDERED:

1. Leave to file a Second Amended Complaint is hereby denied.

2. The action entitled above is hereby dismissed.

Dated January 12, 1978.

/s/ BRUCE R. THOMPSON
United States District Judge

EXHIBIT B

In the United States District Court
for the District of Nevada

[Filed February 21, 1978]

Raymond M. Chenoweth, et al., Plaintiffs, vs. (1) State of Nevada, et al., Defendants.	Civil No. R-74-132 BRT

ORDER DENYING DISQUALIFICATION

Plaintiffs have moved for an order stating that the undersigned district judge is disqualified in the action entitled above alleging that the judge's son, Harold B. Thompson, is and has been a member of the firm of Wait, Shamberger, Georgeson, McQuaid & Thompson which represents one of the parties to this action. The allegation is factually untrue. Said firm represents no one in this action. Harold B. Thompson did not become a member of said firm until January 1, 1978. As an employee of said law firm for two years prior to January 1, 1978, Harold B. Thompson had no financial interest in any of said firm's cases. He, of course, has not appeared before the undersigned judge in this or any other matter, even pro forma or uncontested matters. Inasmuch as Harold B. Thompson has not and is not "acting as a lawyer in the proceeding"

and has not and does not "have an interest that could be substantially affected by the outcome of the proceeding" (28 U.S.C. 455(b)(5)), this alleged basis for disqualification is untenable. Code of Judicial Conduct, Canon 3; Advisory Committee on Judicial Activities, Advisory Opinion No. 25.

Plaintiffs also allege that the undersigned is prejudiced against attorney Kermitt Waters. It is true that in another case, *United States v. Kleifgen*, on November 11, 1977, in which Mr. Waters represented defendant Kleifgen, the undersigned had occasion to reprimand Mr. Waters for pressing on to hearing on a motion for which he had no factual or evidentiary support whatsoever. The undersigned in exasperation indicated that he did not want to see Kermitt Waters in his court any more. This is a far cry from what John E. Thorne mischaracterizes as an "order" on page 3 of his affidavit. The undersigned entertains no general prejudice or specific prejudice against Mr. Waters as an attorney and perhaps did not employ the most prudent form of expression in expressing disfavor with Mr. Waters' conduct in the *Kleifgen* case, but intends to accord Mr. Waters the same consideration given any attorney in appearances in this Court. Disqualification under 28 U.S.C. 144 can only be for personal bias or prejudice against a *party* or in favor of an adverse *party* and must be supported by the affidavit of the *party*. Disqualification under 28 U.S.C. 455(b)(1) arises where the judge "has a personal bias or prejudice concerning a *party*." The law is fully and correctly stated in *Davis v. Board of School Com'rs.*, 517 F.2d 1044 (5th Cir. 1975):

"The office of the procedure under § 144 is to disqualify a judge prior to trial on motion of a party. Section 455 is the statutory standard for disqualification of a judge. It is self-enforcing on the part of the judge. It may also be asserted by a party by motion in the trial court, Rapp v. Van Dusen, 3 Cir., 1965, 350 F.2d 806, 809; through assignment of error on appeal, United States v. Seiffert, 5 Cir., 1974, 501 F.2d 974; Shadid v. Oklahoma City, 10 Cir., 1974, 494 F.2d 1267, 1268, by interlocutory appeal, as here, or by mandamus, Texaco, Inc. v. Chandler, 10 Cir., 1965, 354 F.2d 655.

"The quoted language, supra, in § 455 is new to the federal law of disqualification and we must determine whether Congress intended to overrule the gloss placed on § 144, and impliedly on § 455, by court decisions that it applies only to conduct which runs against a party and not the lawyer, cf. United States ex rel. Wilson v. Coughlin, supra, at 104; Giebe v. Pence, supra, at 943; see also, Annot., 23 A.L.R.3d 1416; and that disqualification results from extra-judicial conduct rather than from matters arising in a judicial context. See United States v. Grinnell Corp., supra, 384 U.S. at 583, 86 S.Ct. 1698, 16 L.Ed.2d at 793; United States v. Board of School Commissioners, supra, at 81, Hanger v. United States, supra, at 101; Mirra v. United States, supra, at 787-88; Tynan v. United States, supra, at 764-65; In re Union Leader Corp., supra, at 388-89. See generally, Annot. 2 A.L.R. Fed. 917.

"We find no suggestion in the legislative history that these decisions were being overruled or in anywise eroded. The new language was designed to substitute the reasonable factual basis—reasonable man test in determining disqualification for the subjective

'in the opinion of the judge' test in use prior to the amendment. Cf. Kinnear-Weed Corp. v. Humble Oil & Refining Corp., 5 Cir., 1971, 441 F.2d 631, 635. It was also intended to overrule the so-called duty to sit decisions. See Edwards v. United States, 5 Cir., 1964, 334 F.2d 360. The abuse of sound judicial discretion test continues to obtain on appellate review. H.Rep. No. 93-1453, 1974 U.S.Code Cong. & Admin.News pp. 6351, 6355.

"Construing §§ 144 and 455 in pari materia we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context. This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned."

In consideration of the premises,

IT HEREBY IS ORDERED that the motion to disqualify the undersigned judge is hereby denied.

Dated February 21, 1978.

/s/ BRUCE R. THOMPSON
United States District Judge

EXHIBIT C

United States Court of Appeals
for the Ninth Circuit

[Filed April 3, 1979]

Raymond M. Chenoweth, et al., Plaintiffs-Appellants, and Sun Cab Inc., dba Nellis Cab Co., et al., Plaintiffs, vs. State of Nevada, et al., Defendants-Appellees.	No. 78-2342 D.C. # R-74-132 Nevada (Reno)

ORDER

Before: GOODWIN and ANDERSON, Circuit Judges.

Upon due consideration of appellees' motions, the opposition thereto, and the record on appeal, the Court orders the following:

(a) the district court's order of dismissal is affirmed, *see Montana v. United States*, No. 77-1134, 47 L.W. 4190 (February 22, 1979); and

(b) the motions to extend briefing time are denied as moot.

EXHIBIT D

United States Court of Appeals
for the Ninth Circuit

[Filed August 13, 1979]

Raymond M. Chenoweth, et al., Appellants, and Sun Cab Inc., dba Nellis Cab Co., et al., Plaintiffs, vs. State of Nevada, et al., Appellees.	No. 78-2342

Appeal from the United States District Court
for the District of Nevada

ORDER

Before: GOODWIN and ANDERSON, Circuit Judges.

On April 16, 1979, appellants filed a petition for rehearing en banc of the order filed April 3, 1979, affirming the district court's order of dismissal and denying motions to extend briefing time. The members of the panel have voted to deny the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.